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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ULLOA,

Defendant and Appellant.

H037192

(Monterey County

Super. Ct. No. SS100226)

In this case, Jose Ulloa (appellant) challenges certain probation conditions that were imposed by the court after he was found guilty of one count of felony possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)). Appellant contends that four of these conditions are unconstitutionally vague and overbroad. For the reasons that follow, we modify three of the probation conditions that were imposed by the court. With those modifications, the judgment is affirmed.

Facts and Proceedings Below

On July 24, 2010, Monterey County Sheriff's Deputy Arras Wilson was patrolling on Division Street in King City. He saw a white 2002 Cadillac Escalade speeding 10 miles over the speed limit; then, the Escalade rolled through a posted stop sign. Deputy Wilson conducted a traffic stop and asked the driver, later identified as appellant, to get out of the vehicle; appellant complied. Upon questioning, appellant informed Deputy Wilson that he had a pocketknife, which he gave to the deputy. Appellant said that he

had no other weapons or drugs on him, and consented to a search. During a pat-down search, Deputy Wilson felt a lump inside the right coin pocket of appellant's pants, which he believed to be narcotics. Upon removing a bindle from appellant's pocket, Deputy Wilson identified the contents as crystal methamphetamine. Deputy Wilson asked appellant why he had not disclosed the methamphetamine. Appellant responded that he forgot it was in his pocket and that he "occasionally uses methamphetamine" because it "gives him energy while he's at work." In a search of the vehicle, the deputy found a methamphetamine smoking pipe with burnt residue under the front passenger seat. Using a narcotics identification kit, Deputy Wilson conducted a test on the substance in the bindle. The result was presumptive positive for the presence of methamphetamine. The substance weighed 0.3 grams.

The Monterey County District Attorney charged appellant by information with one count of felony transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)). On July 8, 2011, appellant waived his right to a jury trial and elected to have the case tried to the court. In exchange, the People amended the information to add one count of felony possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and dismissed the transportation charge in the furtherance of justice (Pen. Code, § 1385). On July 11, 2011, after the matter was submitted on the police report, laboratory report and the preliminary hearing transcript, the court found appellant guilty of the possession charge.

At the sentencing hearing on July 26, 2011, the trial court suspended imposition of sentence and placed appellant on 18 months Proposition 36 probation. Although the various terms and conditions of probation were orally pronounced, the record contains an unsigned probation order, with an identical signed minute order, which contain variations from the oral pronouncements. The oral probation conditions and written conditions relevant to this appeal are as follows:

"Number 5, totally abstain from the use of alcohol. Do not purchase or possess alcohol [*sic*] beverages, and stay out of places where alcohol is the main item of sale." The minute order states: "Totally abstain from the use of alcoholic beverages, not purchase or possess alcoholic beverages, and stay out of places when it is the main item of sale."

"Number 6 is modified to read: Do not use, deal, or possess any narcotics, drugs, or controlled substances without prescription of a physician." The minute order states: "Not use, deal, or possess narcotics, intoxicants, drugs, or other controlled substances without the prescription of a physician; not traffic in, or associate with persons you know, or have reason to suspect, use or traffic in narcotics or other controlled substances."

"Number 11, because this is a felony, do not possess, receive, or transport any firearm, ammunition, or any deadly or dangerous weapon. Immediately surrender such item to law enforcement." The minute order states: "Not possess, receive or transport any firearm, ammunition or any deadly or dangerous weapon. Immediately surrender any firearms or ammunition you own or possess to law enforcement (P.C. § 12021)."

"Number 14 is amended to read, do not associate with any individuals you suspect to be drug users or on parole supervision outside a program setting." The minute order states: "Not associate with any individuals you know or suspect to be drug users, or on any form of probation or parole supervision outside a program setting."

Appellant timely filed a notice of appeal.

Discussion

On appeal, appellant argues that the court should modify the four orally

pronounced probation conditions, which differ from the written minute orders, because they are vague and overbroad.¹

The People do not contest that the challenged probation conditions are constitutionally deficient for lack of a knowledge requirement. Rather the People urge this court to adopt the approach set forth by the Third District Court of Appeal in *People v. Patel* (2011) 196 Cal.App.4th 956, 960 (*Patel*). We decline to adopt *Patel* and, instead, modify three of appellant's probation conditions.

"In granting probation, courts have broad discretion to impose conditions to foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1. [Citations.]" (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120-1121; *People v. Leon* (2010) 181 Cal.App.4th 943, 948 (*Leon*).) Reasonable probation conditions may infringe upon constitutional rights provided they are narrowly tailored to achieve those legitimate purposes. (*People v. Olguin* (2008) 45 Cal.4th 375, 384 (*Olguin*); *Sheena K.*, *supra*, 40 Cal.4th at p. 890.) "[P]robation is a privilege and not a right," (*Olguin*, at p. 384), and "[i]nherent in the very nature of probation is that probationers 'do not enjoy 'the absolute liberty to which every citizen is entitled.' " (*U.S. v. Knights* (2001) 534 U.S. 112, 119; *Griffin v. Wisconsin* (1987) 483 U.S. 868, 874.)

"A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*Sheena K.*, *supra*, 40 Cal.4th at p. 890; *Leon*, *supra*, 181 Cal.App.4th at pp. 948-949.) In addition, "[a] probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the

¹ Although defendant did not object to the conditions at issue when they were imposed, the forfeiture rule does not apply when a probation condition is challenged as unconstitutionally vague or overbroad on its face and the claim can be resolved on appeal as a pure question of law without reference to the sentencing record. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 888-889 (*Sheena K.*).)

court to determine whether the condition has been violated,' if it is to withstand a [constitutional] challenge on the ground of vagueness." (*Sheena K.*, at p. 890; *Leon*, at p. 949; *People v. Freitas* (2009) 179 Cal.App.4th 747, 750.)

As noted, while the People do not object to modification of the challenged probation conditions, they urge the court to adopt the approach set forth in *Patel, supra*, 196 Cal.App.4th 956. In that case, the Third District considered whether a probation condition ordering that the defendant not drink alcohol, possess it, or be in a place where it was the chief item of sale was invalid because it lacked a knowledge requirement. (*Id.* at p. 959.) The court expressed its frustration with the "dismaying regularity" with which "we still must revisit the issue in orders of probation" that do not include a qualification that the defendant must commit the proscribed conduct knowingly. (*Id.* at p. 960.) Noting that "there is now a substantial uncontradicted body of case law establishing, as a matter of law, that a probationer cannot be punished for presence, possession, association, or other actions absent proof of scienter" (*ibid.*), the *Patel* court announced that it would "no longer entertain this issue on appeal" (*ibid.*) and, moving forward, it would "construe every probation condition proscribing a probationer's presence, possession, association, or similar action to require the action be undertaken knowingly" (*ibid.*), without modifying a probation order that "fails to expressly include such a scienter requirement" (*id.* at p. 961). In *People v. Moses* (2011) 199 Cal.App.4th 374, 381, the Fourth District declined to adopt the *Patel* approach, choosing instead to modify probation conditions to include a knowledge requirement.

While we too are frustrated by how frequently this issue arises and, in these days of strained budgets, we agree that the interests of fiscal and judicial economy are critical, we decline to follow the Third District's approach in *Patel*. Our Supreme Court faced the issue of the lack of a knowledge requirement in a probation condition and the remedy it mandated was unequivocal: "[W]e agree with the Court of Appeal *that modification to*

impose an explicit knowledge requirement is necessary to render the condition constitutional." (*Sheena K.*, *supra*, 40 Cal.4th at p. 892, italics added.) Until our Supreme Court rules differently, we will follow its lead on this point.² (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

That being said, we take this opportunity to direct that the Superior Court of the State of California for the County of Monterey should take steps to ensure that its probation conditions both as announced by the court and in the court's minute order meet constitutional requirements by including "know or reasonably should know" in probation conditions.

We recognize that in order to be sufficiently precise for a probationer to know what is required of him or her, a requirement of knowledge should be included in some probation conditions prohibiting the possession of specified items. (*People v. Freitas*, *supra*, 179 Cal.App.4th at pp. 751-752.) However, we also recognize that as one of the objectives of probation conditions is to prevent future criminality, it is common for probation conditions to reference, restate, echo, or parallel criminal statutes. When the underlying criminal statute, such as prohibiting possession of guns and ammunition, has been judicially construed as including an implicit knowledge requirement, we believe that the parallel probation condition should be given the same construction. Due process does not require greater precision of the probation conditions implementing criminal statutes than it does of the statutes themselves. Accordingly, we will order modifications to some, but not all, of the conditions challenged by appellant.

² This court is unaware of any authority that would allow an appellate court to amend trial court orders in cases not before the court. Appellate jurisdiction is confined to those decisions of the trial court that have been put before the appellate court by way of appeal or writ. (*Leone v. Medical Board* (2000) 22 Cal.4th 660, 666 [appellate jurisdiction is limited to the procedural context of a direct appeal or writ petition].)

No-Alcohol Requirement

Since probation conditions that implicate constitutional rights must be narrowly drawn, the knowledge requirement in some probation conditions "should not be left to implication." (*People v. Garcia* (1993) 19 Cal.App.4th 97, 102.) Absent a requirement that appellant know he is disobeying the condition, he is vulnerable, and unfairly so, to punishment for unwitting violations of it. (See *People v. Lopez* (1998) 66 Cal.App.4th 615, 628-629.) An appellate court is empowered to modify a probation condition in order to render it constitutional. (*Sheena K., supra*, 40 Cal.4th at p. 892.) In this case, we will modify probation condition 5, which prohibits the possession of alcohol, to include a knowledge requirement.

*No-Drugs Condition*³

As to probation condition 6, which requires that appellant "not use, deal, or possess any narcotics, drugs, or controlled substances without [a] prescription of a physician," we note that a significant amount of the behavior described in this condition has already been criminalized. The California Uniform Controlled Substances Act (Health & Saf. Code, § 11000 et seq.; sometimes "the Act") regulates the use of controlled substances in California. Five sections of the Act each contain a numbered schedule (I-V) listing a variety of controlled substances. (Health & Saf. Code, §§ 11054-11058.) For example, marijuana is listed in Schedule I as a controlled hallucinogenic substance. (Health & Saf. Code, § 11054, subd. (d)(13).) The Act provides a definition of "narcotic drug" (Health & Saf. Code, § 11019) and it defines "narcotics" in other statutes as listed controlled substances (Health & Saf. Code, § 11032). Various narcotic drugs are listed in Schedules II (Health & Saf. Code, § 11055, subd. (b)), III (Health &

³ Since the trial court did not orally announce a no-association restriction in probation condition 6, we must assume that it did not intend to impose that restriction on appellant. (See *People v. Gabriel* (2010) 189 Cal.App.4th 1070, 1073; *People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2.)

Saf. Code, § 11056, subd. (e)), IV (Health & Saf. Code, § 11057, subd. (c)), and V (Health & Saf. Code, §11058, subd. (c)).

Health and Safety Code section 11350, subdivision (a) of the Controlled Substances Act makes it a felony to possess certain controlled substances listed in all Schedules except II without a written prescription. Health and Safety Code section 11377 makes it either a felony or a misdemeanor to possess yet other controlled substances listed in all Schedules without a prescription. Unlawful possession of "not more than 28.5 grams of marijuana" is a misdemeanor offense. (Health & Saf. Code, § 11357, subd. (b).)

"[A]lthough criminal statutes prohibiting the possession, transportation, or sale of a controlled substance do not expressly contain an element that the accused be aware of the character of the controlled substance at issue ([Health & Saf. Code,] §§ 11350-11352, 11357-11360, 11377-11379), such a requirement has been implied by the courts." (*People v. Coria* (1999) 21 Cal.4th 868, 878.) "The essential elements of unlawful possession of a controlled substance are 'dominion and control of the substance in a quantity usable for consumption or sale, with knowledge of its presence and of its restricted dangerous drug character.' " (*People v. Martin* (2001) 25 Cal.4th 1180, 1184.)

Nevertheless, condition 6 goes further than just prohibiting the possession of controlled substances. It prohibits the *use* of controlled substances, narcotics and drugs without a physician's prescription.

Pursuant to Health and Safety Code section 11550, subdivision (a), it is unlawful to use or be under the influence of any of the following controlled substances: From Schedule I, opiates (Health & Saf. Code, § 11054 subd. (b)); opium derivatives (Health & Saf. Code, § 11054, subd. (c)); the depressants mecloqualone and methaqualone (Health & Saf. Code, § 11054, subd. (e)); cocaine base (Health & Saf. Code, 11054 subd. (f)(1)); mescaline (Health & Saf. Code, § 11054, subd. (d)(14)); peyote (Health & Saf. Code, §

11054, subd. (d)(15)); and the hallucinogenic phencyclidines, including PCE and TCP (Health & Saf. Code, § 11054, subds. (d)(21), (d)(22), (d)(23)). From Schedule II, opium and its derivatives, coca leaves, cocaine, and ecgonine (Health & Saf. Code, § 11055, subd. (b)); opiates (Health & Saf. Code, § 11055, subd. (c)); amphetamine and methamphetamine (Health & Saf. Code, § 11055, subds. (d)(1), (d)(2)); and the depressant phencyclidines, including PCP (Health & Saf. Code, § 11055, subd. (e)(3)). From Schedules III, IV, and V, narcotic drugs. (Health & Saf. Code, § 11056 et seq.) However, the prohibition does not apply when the drug has been "administered by or under the direction of a person licensed by the state to dispense, prescribe, or administer controlled substances." (Health & Saf. Code, § 11550, subd. (a).) Although the defendant need only raise a reasonable doubt about whether his or her use was lawful because of a valid prescription (see *People v. Mower* (2002) 28 Cal.4th 457, 479), "[i]t shall be the burden of the defense to show that it comes within the exception." (Health & Saf. Code, § 11550, subd. (a).)

As can be seen, the statutory scheme governing the use and possession of controlled substances is far less than straightforward; in an abundance of caution we will modify probation condition 6 to include a knowledge requirement.

Appellant argues that the condition must be modified to clarify that he may not use or possess unlawful drugs. Unless we assume the trial court used the word "drugs" as a synonym for controlled substances, the condition as pronounced can be understood to include within its ambit legal, nonprescription medications such as aspirin. There is no indication in the record that the trial court intended any such result. Inserting the adjective "unlawful" before drugs, however, renders the probation condition unintelligible because it would forbid appellant from using, dealing or possessing unlawful drugs unless he had a prescription from a physician. The reference to "drugs" as a synonym for controlled substances, however, adds nothing to the probation

condition. Therefore, for the sake of clarity, probation condition number 6 will be modified to delete the superfluous reference to "drugs."

No-Firearms Condition

Appellant contends that the oral pronouncement of probation condition 11, stating that "because this is felony, do not possess, receive, or transport any firearm, ammunition, or any deadly or dangerous weapon," is constitutionally defective for vagueness because it does not include a knowledge requirement. Further, he argues that the written probation condition referencing Penal Code section 12021, the statute forbidding a felon from possessing a firearm, is also defective for vagueness because it does not specify an explicit knowledge requirement.

In *People v. Kim* (2011) 193 Cal.App.4th 836 (*Kim*), this court held that an explicit knowledge requirement is not a required element of every probation condition. In *Kim*, the defendant was prohibited as a condition of probation from owning, possessing, or having within his custody or control "any firearm or ammunition for the rest of [his] life under Section[s] 12021 and 12316 [subdivision] (b)(1) of the Penal Code." (*Id.* at p. 840.) On appeal, the defendant contended that the probation condition lacked a knowledge requirement. This court concluded that "where a probation condition implements statutory provisions that apply to the probationer independent of the condition and does not infringe on a constitutional right, it is not necessary to include in the condition an express scienter requirement which is necessarily implied in the statute." (*Id.* at p. 843.) With regard to the probation condition in this case prohibiting appellant from possessing a firearm, the rationale of *Kim* is applicable. Similar to *Kim*, the probation condition in this case is the same as the statutory provision in Penal Code section 12021 prohibiting a person convicted of a felony from possessing a firearm. Since the firearms prohibition in this case implements a statutory provision, it does not require the addition of a knowledge requirement. (*Ibid.*) As this knowledge requirement

is implicit, due process does not require making it explicit. However, modification of the written minute order, which references Penal Code section 12021, is required in this case. Penal Code section 12021 was repealed effective January 1, 2012. (Stats. 2010, ch. 711, § 4.) The statute forbidding, among other things, a felon to be in possession of a firearm is now contained in Penal Code section 29800. (Stats. 2010, ch. 711, § 6, operative Jan. 1, 2012.) Accordingly, to avoid any confusion, we will direct the clerk of the court to amend probation condition 11 by deleting the reference to Penal Code section 12021.

No-Association Condition

Probation condition 14 instructs appellant: "[D]o not associate with any individuals you suspect to be drug users or on parole supervision outside a program setting." Appellant contends that the word "suspect" renders the probation condition unconstitutionally vague and overbroad. We agree.

In *People v. Gabriel, supra*, 189 Cal.App.4th at page 1073, this court considered a constitutional challenge to a probation condition instructing a probationer to " '[n]ot associate with any individuals you know or suspect to be gang members, drugs users, or on any form of probation or parole supervision.' " We reasoned as follows: "To 'suspect' is 'to imagine (one) to be guilty or culpable on slight evidence or without proof' or 'to imagine to exist or be true, likely, or probable.' (Merriam-Webster's Collegiate Dict. (10th ed. 1999) p. 1187 (Webster's).) To 'imagine' is 'to form a notion of without sufficient basis.' (Webster's, at p. 578.) Given this lack of specificity, the word 'suspect' fails to provide defendant with adequate notice of what is expected of him when he lacks actual knowledge that a person is a gang member, drug user, or on probation or parole. Moreover, inclusion of this word renders the condition insufficiently precise for a court to determine whether a violation has occurred." (*Ibid.*)

Accordingly, the challenged condition must be modified to replace the word "suspect" with "know." Thus, the no-association probation conditions will be modified to

clarify that appellant is prohibited from associating with any individuals he knows are drug users or on parole supervision outside a program setting.

Disposition

Probation conditions 5, 6 and 14 are modified as follows:

Number 5, Do not knowingly use alcoholic beverages. Do not knowingly purchase or possess any alcoholic beverages, and stay out of places where you know alcohol is the main item of sale.

Number 6, Do not knowingly use, deal, or possess any narcotics or controlled substances without a physician's prescription.

Number 14, Do not associate with any individuals you know to be drug users or on parole supervision outside a program setting.

The clerk of the court is directed to amend the minute order of July 26, 2011, by deleting the reference to Penal Code section 12021.

As so modified, the judgment is affirmed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.